

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION

<b>Carol A. Wilson, et al</b>	)	Case No.: 2:17-cv-317
	)	
<i>Plaintiffs,</i>	)	Chief Judge George C. Smith
	)	
vs.	)	Magistrate Judge Elizabeth P. Deavers
	)	
<b>Fioritto Construction, LLC</b>	)	
	)	
<i>Defendant.</i>	)	

AFFIDAVIT OF CAROL WILSON IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY  
JUDGMENT

STATE OF OHIO                    )  
  ) SS:  
COUNTY OF FRANKLIN        )

I, Carol A. Wilson, being first duly cautioned and sworn, depose and state:

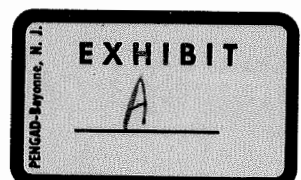
1. That I am the Administrator for the Trustees of the Ohio Operating Engineers Health and Welfare Plan, the Trustees for the Ohio Operating Engineers Pension Fund, the Trustees for the Ohio Operating Engineers Education and Safety Fund, and the Trustees for the Ohio Operating Engineers Apprenticeship Fund ("Funds"). I have personal knowledge of the following facts:

2. Defendant, Fioritto Construction, LLC, ("Defendant"), is a party to a collective bargaining agreement with the International Union of Operating Engineers, Local 18 (the "Union"), which obligates Defendant to make contributions to Funds on behalf of Defendant's employees.

3. In an audit conducted November 18, 2016, the Funds determined that Defendant failed to make contributions to the Funds as required by Defendant's collective bargaining agreements and the Trust Agreements covering the various Funds. The results of that audit, including the manner in which contributions were calculated based upon each hour worked by each employee is reflected in the Funds' correspondence dated January 5, 2017, attached hereto as Exhibit 1.

4. When employers make payments to the Funds that do not fully cover the delinquent contributions, the Funds must make a decision as to which participant accounts to credit for those payments. Given that the Trustees act as fiduciaries on behalf of all participants, the Funds follow a standard practice of crediting the contributions toward the oldest unpaid hours.

5. On January 12, 2017, Defendant submitted payment to the Funds in the amount of \$963.35. On March 20, 2017, the Funds confirmed receipt of the payment and provided Defendant



with an updated audit balance. A copy of the Funds March 20, 2017 correspondence is attached hereto as Exhibit 2. Plaintiff's audit findings were reduced to \$17,034.04 – the same amount sought in the Funds' Complaint filed with the Court on April 14, 2017 .

6. The rules and regulations adopted by the Trustees of the Funds specifically provide that the Trustees shall be entitled to recover, in addition to the delinquent contributions, interest on the delinquent contributions at the rate of 18 percent per annum calculated from the date of discovery of the delinquencies (which is usually the date Defendant's payroll records were audited); in addition, the Trustees adopted rules and regulations providing that the Trustees shall be entitled to recover, in addition to the delinquent contributions, statutory interest calculated at the rate of 18 percent per annum on the amount of delinquent contributions.

7. The Trustees have established the interest rate of 18 percent per annum upon unpaid audit findings. Attached hereto as Exhibit 3 are the resolutions of adopting the above-referenced interest rate. The annual interest rate is converted to the monthly interest of 1 1/2 %. Contributing employers are reminded monthly of this interest charge. A copy of the Contribution Reporting Form used each month is attached as Exhibit 4.

8. The Funds' interest calculation is reflected on Exhibit 5. Through June 6, 2018 interest is due in the amount of \$5,547.46. That amount increases by \$8.40 each day.

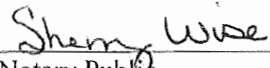
Further Affiant Sayeth Naught.

  
\_\_\_\_\_  
Carol A. Wilson, Administrator

Sworn to before me and subscribed in my presence this 6th day of June, 2018.



**SHERRY WISE**  
Notary Public, State of Ohio  
My Commission Expires 09-01-2021

  
\_\_\_\_\_  
Notary Public



## OHIO OPERATING ENGINEERS FRINGE BENEFIT PROGRAMS

1180 Dublin Road  
PO Box 12009  
Columbus OH 43212-0009  
614.488.0708

Carol A. Wilson  
Administrator

January 5, 2017

FIORITTO CONSTRUCTION LLC  
2403 TAMARACK TRL  
RAVENNA OH 44266-8270

#001010600-6

To Whom It May Concern:

The enclosed summary sheet(s) and adjustment schedule(s) reflect the findings of our recent audit which resulted in the disclosure of unpaid fringe benefit contributions due the Ohio Operating Engineers Fringe Benefit Programs and Union Administrative Dues which had been withheld from employees wages but not remitted.

Ohio Operating Engineers Health & Welfare Plan	\$ 9,327.04
Ohio Operating Engineers Pension Fund	7,473.00
Ohio Operating Engineers Apprenticeship & Training Fund	934.14
Ohio Operating Engineers Education & Safety Fund	112.11
Late Charges due if paid by January 15, 2017	<u>1,369.67</u>
Total due Fringe Benefit Programs	\$19,215.96
Local 18 Administrative Dues	<u>59.56</u>
Total Due	\$19,275.52

In addition to the audit findings, you are liable for the payment of late charges as indicated above. Late charges accumulate at the rate of 1-1/2% per month on past due fringe benefit contributions, and are assessed as of the sixteenth day of the month. If partial payments are received, they will be applied against the oldest unpaid amounts due.

If you are in disagreement with the findings of our audit, please specify to us the reasons for such disagreement by separate letter within ten days.

If you are in agreement with the findings, your remittance in the total amount of \$19,275.52 before January 15, 2017 will prevent the assessment of additional late charges.

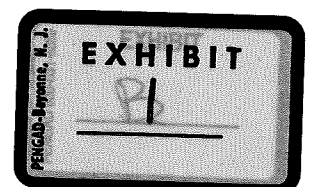
Sincerely,

*Samantha Polsinelli*

Samantha Polsinelli  
Assistant Administrator

SP/sm

cc: District #6  
Richard E. Dalton  
Justin Helmick



# OHIO OPERATING ENGINEERS FRINGE BENEFIT PROGRAMS FIELD AUDIT SUMMARY

CODE # 001010600-6NAME: Fioritto Construction LLCDATE: 11/18/162403 Tamarack TrlAUDIT PERIOD FROM: 7/1/15 TO: 11/1/16Ravenna, OH 44266-8270AUDITOR: Douglas H Baker

MONTH YEAR	HEALTH & WELFARE		PENSION		APPRENTICESHIP		EDUC. & SAFETY		TOTAL FRINGES	ADMIN DUES	TOTAL FRINGES & DUES
	HOURS	AMOUNT	HOURS	AMOUNT	HOURS	AMOUNT	HOURS	AMOUNT			
3/16	143 1/2	1,063.34	143 1/2	861.00	143 1/2	107.63	143 1/2	12.92	2,044.89		2,044.89
4/16	464 1/2	3,441.95	464 1/2	2,787.00	464 1/2	348.38	464 1/2	41.81	6,619.14	59.56	6,678.70
5/16	246	1,822.86	246	1,476.00	246	184.50	246	22.14	3,505.50		3,505.50
7/16	4	30.64	4	24.00	4	3.00	4	0.36	58.00		58.00
9/16	119	911.54	119	714.00	119	89.25	119	10.71	1,725.50		1,725.50
10/16	268 1/2	2,056.71	268 1/2	1,611.00	268 1/2	201.38	268 1/2	24.17	3,893.26		3,893.26
TOTALS	1245 1/2	9,327.04	1245 1/2	7,473.00	1245 1/2	934.14	1245 1/2	112.11	17,846.29	59.56	17,905.85



## FORM D-16 (9/99)

FIELD AUDIT

AUDITOR: Douglas Baker

SOC SEC. #	EMPLOYEE	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC	TOTALS
291-68-1541	Yelling, T							4		59 1/2	134			197 1/2
	Fioritto, T									59 1/2	134 1/2			194
DEPOSIT DATE	TOTAL HOURS							4		119	268 1/2			391 1/2
	H & W @ 7.66							30.64		911.54	2,056.71			2,998.89
	PENS @ 6.00							24.00		714.00	1,611.00			2,349.00
	APPR @ 0.75							3.00		89.25	201.38			293.63
	E & S @ 0.09							0.36		10.71	24.17			35.24
	TOTAL @ 14.50							58.00		1,725.50	3,893.26			5,676.76



# OHIO OPERATING ENGINEERS

## FRINGE BENEFIT PROGRAMS

1180 Dublin Road  
PO Box 12009  
Columbus OH 43212-0009  
614.488.0708

Carol A. Wilson  
Administrator

March 20, 2017

FIORITTO CONSTRUCTION LLC  
2403 TAMARACK TRL  
RAVENNA OH 44266-8270

#001010600-6

To Whom It May Concern:

This will acknowledge the receipt of your letter dated January 12, 2017, and your check #5886 in the amount of \$963.35. The letter states you are in disagreement with the audit findings. Please provide a breakdown and specify why you are in disagreement with the audit findings. In accordance with our policy, this check has been applied against the oldest amounts outstanding on your account as follows:

Against Audit Finding	\$812.25
Local 18 Dues	59.56
Against Late Charges	<u>91.54</u>
	\$963.35

After the application of the above check, a balance of \$19,078.70 now remains due on your account to complete payment of the following:

Balance of Audit Finding	\$17,034.04
Balance of Late Charges if Audit is Paid by April 15, 2017	<u>2,044.66</u>
	\$19,078.70

In addition, your reports and contributions for November 2016 through February 2017 are due.

Please submit your check in payment of this outstanding balance. If you have any questions concerning your account, please contact our office.

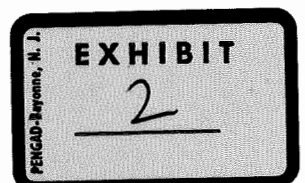
Sincerely,



Samantha Polsinelli  
Assistant Administrator

SP/sm

cc: District #6  
Richard E. Dalton  
Justin Helmick  
Elizabeth B. Howard, Esq.



After discussion and deliberation, The Trustees of the Ohio Operating Engineers Health and Welfare Plan adopt the following resolutions at their regular meeting held on the date below:


RESOLVED, that the Trust Agreement is hereby amended to provide that the reasonable cost of collecting assessments with respect to delinquent contributions to the Plan shall include: (a) late charges (interest) on all unpaid contributions, at the rate determined by the Trustees by resolution; (b) Liquidated damages as permitted by law; (c) Reasonable attorneys fees; (d) Costs of any action to recover such delinquent contributions; and (e) any other damages permitted by law or contract; and

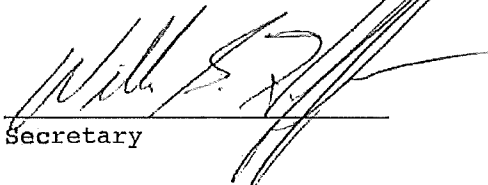
FURTHER RESOLVED, that the Chairman and the Secretary be, and they hereby are, authorized to execute any and all documents necessary to amend the Trust Agreement as provided in this resolution; and

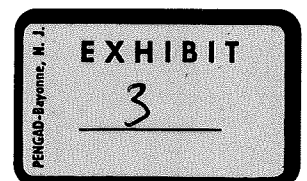
FURTHER RESOLVED, that the late charges rate in effect under the Plan which currently is eighteen percent (18%) per annum shall continue as the rate of interest specified under the Plan for purposes of determining cost of collection assessments.

Dated June 13, 1989

Trustees of the Ohio Operating  
Engineers Health and Welfare Plan

  
Chairman

  
Secretary



After discussion and deliberation, the Trustees of the Ohio Operating Engineers Pension Fund hereby adopt the following resolutions at their regular meeting held on the date below:

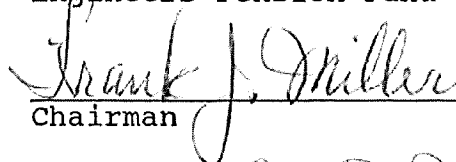
RESOLVED, that the Trust Agreement is hereby amended to provide that the reasonable cost of collecting assessments with respect to delinquent contributions to the Plan shall include: (a) late charges (interest) on all unpaid contributions, at the rate determined by the Trustees by resolution; (b) Liquidated damages as permitted by law; (c) Reasonable attorneys fees; (d) Costs of any action to recover such delinquent contributions; and (e) any other damages permitted by law or contract; and


FURTHER RESOLVED, that the Chairman and the Secretary be, and they hereby are, authorized to execute any and all documents necessary to amend the Trust Agreement as provided in this resolution; and

FURTHER RESOLVED, that the late charges rate in effect under the Plan which currently is eighteen percent (18%) per annum shall continue as the rate of interest specified under the Plan for purposes of determining cost of collection assessments.

Dated May 26, 1989.

Trustees of the Ohio Operating  
Engineers Pension Fund

  
Chairman

  
Secretary

**FRINGE BENEFIT PROGRAMS  
CONTRIBUTION REPORTING FORM**

CERTIFICATION OF AUTHORIZED PERSON	
Signature :	
Title :	Date :

- PLEASE MAKE A COPY FOR YOUR RECORDS
- SUBMIT ORIGINAL WITH PAYMENT
- RATE CHANGE EFFECTIVE 6/1/2016
  - HEALTH AND WELFARE - \$7.66/ PENSION - \$6.00
  - APPRENTICESHIP - \$0.75 | EDUCATION - \$0.09

**TOTAL HOURS ALL PAGES :**

**OVER**

Back of this form has general  
instructions

**MAKE ONE CHECK FOR TOTAL CONTRIBUTIONS PAYABLE TO:  
OHIO OPERATING ENGINEERS FRINGE BENEFIT PROGRAMS**

TOTAL CONTRIBUTIONS	
\$	

GENERAL INSTRUCTIONS

- A. If employees have been pre-listed on the front of this form, they are those who were reported to the fund office on your last report. Delete names of any individuals not employed during month being reported. Add names and social security numbers of any new employees. List hours of all active employees.
- B. Indicate county in which work was performed.
- C. Use a separate form for each month being reported.
- D. Hours reported must include all hours paid during month covered by this report. "HOURS PAID" means the actual number of hours. Do not pay one-and-one half or double contributions for overtime hours.
- E. All employees working as Operating Engineers must be reported to the Fund WHETHER MEMBERS OF THE UNION OR NOT. This is required under the provisions of the Taft-Hartley Law.
- F. Reports must be submitted each month, even though no hours have been worked. Such reports should be marked "No Employees" to reflect a temporary unemployment situation. However, if you do not anticipate employing operating engineers for a period of six months or more, mark the report "FINAL".
- G. When making final report for work performed in the jurisdiction of the OHIO OPERATING ENGINEERS FRINGE BENEFIT PROGRAMS, that report should be marked "Final" to stop the mailing of additional forms.
- H. On or before the fifteenth (15<sup>th</sup>) day of the month following the close of the month during which hours were worked mail original and one copy to:

OHIO OPERATING ENGINEERS  
FRINGE BENEFIT PROGRAMS  
PO BOX 12009  
COLUMBUS OH 43212-0009

- I. One copy of this form must be preserved by the employer at his principal place of business and must be available for inspection by duly authorized representatives of the OHIO OPERATING ENGINEERS FRINGE BENEFITS PROGRAMS.
- J. Late charges amounting to 1 ½ % of the contributions due will be assessed for each month that contributions are or became past due. An additional 1 ½ % will be charged each month until paid.
- K. All correspondence should be addressed to:

OHIO OPERATING ENGINEERS  
FRINGE BENEFIT PROGRAMS  
PO BOX 12009  
COLUMBUS OH 43212-0009

- L. PAC-PEP can be included and paid with fringe payments.

